BINTULU DEVELOPMENT AUTHORITY A

v.

PILECON ENGINEERING BHD

COURT OF APPEAL, PUTRAJAYA B
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: Q-02-458-04]
23 FEBRUARY 2007 C

ARBITRATION: *Agreement - Reference of dispute - Referral by arbitrator by way of case stated to High Court for determination of questions of law - Whether judge had answered said questions erroneously - Appointment of arbitrator - Whether valid - Ad hoc agreement - Mistake - Estoppel - Arbitration Act 1952, s. 22(1)(a)* D

ARBITRATION: *Arbitrator - Appointment - Whether valid - Referral by arbitrator by way of case stated to High Court for determination of questions of law - Whether judge had answered said questions erroneously - Ad hoc agreement - Mistake - Estoppel - Arbitration Act 1952, s. 22(1)(a)* E

The arbitrator, at the request of the appellant and the respondent, referred by way of case stated pursuant to s. 22(1)(a) of the Arbitration Act 1952 ('Act') the following five questions of law for F the determination of the High Court: (i) Whether or not a dispute or difference had arisen between the appellant and the respondent ('Q1'); (ii) if the answer to Q1 was in the affirmative, whether there was a reference of the dispute or difference by the respondent to the engineer (as stated in cl. 43 of the General G Conditions of Contract) for a decision ('Q2'); (iii) if the answer in Q2 was in the negative, whether the arbitration could be proceeded with and continued further ('Q3'); (iv) alternatively, whether the arbitrator had been validly appointed by the parties pursuant to the Letter of Appointment dated 12 December 2001 H ('LOA') ('Q4'); and (v) in the further alternative, whether the appellant, in view of its conduct as stated in the statement of agreed facts, was now entitled to dispute the validity of the arbitration proceedings ('Q5'). Q1 was answered by the learned judge in the negative, and consequently, Q2 did not arise for I consideration. Notwithstanding that Q2 was not answered, the learned judge answered in the affirmative to Q3, in view of his

affirmative and negative answers to Q4 and Q5 respectively. Dissatisfied with the decision, the appellant appealed, directing the appeal against the learned judge's answers to Q3, Q4 and Q5. The appellant contended that the answers to the questions were erroneous on the grounds that: (i) since the learned judge had made a finding that there was no dispute or difference between the parties, there was no valid reference to arbitration that could have been made as there was a mistaken belief with regard to the existence or otherwise of a dispute or difference between the parties; (ii) the LOA was vitiated on the ground that there was a mistake; and (iii) the doctrine of estoppel did not arise in this case as the recital in the LOA was premised on a mistake.

Held (dismissing the appeal)
Per Nik Hashim JCA:

(1) After reference to the arbitration, the parties engaged actively in the arbitration proceedings wherein both parties, *inter alia*, were involved in the nomination of and appointment of the arbitrator; they attended the preliminary meeting with the arbitrator; the respondent served the points of the claim; and the appellant made an interlocutory application for further and better particulars. All these go to show that there was clearly an *ad hoc* reference to the arbitrator. Moreover, the parties must have acknowledged the validity of the reference to the arbitration when they invoked s. 22 of the Act to refer the five questions of law for the decision of the High Court. Further, the LOA was jointly executed by the parties following an exchange of five letters on the appointment of the arbitrator. It was clear from the recital that the LOA was jointly made and thus constituted a fresh or an *ad hoc* agreement. It was the result of a continuous agreement to arbitrate (the arbitration cl. 43 of the underlying contract) being crystallized into an individual agreement to arbitrate (the LOA). (paras 8 & 9)

(2) The underlying facts and background events were not in dispute. If at all, what was misapprehended was the inference or conclusion to be drawn from the settled facts to be applied within the arbitration cl. 43. Such an inference or a conclusion was a matter of construction by the court. It was trite law that the construction of a written document was a question of law and not fact. Hence, the existence of a mistake as alleged by the appellant, even if applicable, was at

most a mistake of law. A mistake of law would not have any vitiating effect. The LOA remained a valid *ad hoc* agreement to appoint the arbitrator, thus empowering him with the necessary jurisdiction to hear the matter. (para 10)

(3) The appellant, in view of its conduct as stated in the 16 items in the statement of agreed facts in the appeal record, was not entitled to dispute the validity of the arbitration proceedings. The appellant had participated in the arbitration proceedings from the inception. The parties had intended the LOA to be binding on them and there was no mistake with regard to that. The learned judge was therefore correct in permitting estoppel to be raised and answering the questions that the arbitrator was validly appointed and had jurisdiction to hear the matter. The learned judge had thus answered Q3, Q4 and Q5 correctly. (para 12)

Bahasa Malaysia *translation of headnotes*

Penimbangtara, atas kehendak perayu dan responden dan melalui 'stated case', telah mengemukakan lima persoalan undang-undang ke Mahkamah Tinggi di bawah s. 22(1)(a) Akta Timbangtara 1952 ('Akta'), iaitu: (i) sama ada suatu pertikaian telah berbangkit di antara perayu dan responden ('S1'); (ii) jika jawapan kepada S1 afirmatif, sama ada pertikaian telah dirujuk oleh responden kepada jurutera untuk satu keputusan (seperti yang tertera dalam fasal 43 Syarat-Syarat Am Kontrak) ('S2'); (iii) jika jawapan kepada S2 negatif, sama ada timbangtara boleh diteruskan ('S3'); (iv) secara alternatifnya, sama ada penimbangtara telah dilantik dengan sahnya oleh pihak-pihak berdasarkan Surat Perlantikan bertarikh 12 Disember 2001 ('SP') ('S4'); dan (v) secara alternatif selanjutnya, sama ada perayu, mengambilkira kelakuannya sepertimana yang dinyatakan dalam penyata fakta-fakta dipersetujui, kini boleh mempertikai kesahan prosiding timbangtara ('S5'). S1 dijawab oleh yang arif hakim secara negatif, dan kerana itu S2 tidak berbangkit untuk pertimbangan. Walaupun S2 tidak dijawab, yang arif hakim telah menjawab S3 secara afirmatif, setelah menjawab S4 and S5 masing-masingnya secara afirmatif dan negatif. Tidak berpuashati dengan jawapan-jawapan, perayu merayu sekaligus mengarahkan rayuan kepada jawapan yang arif hakim terhadap S3, S4 dan S5. Perayu berhujah bahawa jawapan kepada soalan-soalan tersebut adalah khilaf atas alasan: (i) oleh kerana yang arif hakim telah membuat rumusan bahawa tidak terdapat pertikaian atau perselisihan di antara pihak-pihak, maka satu rujukan sah untuk

timbangtara tidak boleh dibuat, kerana adanya salah anggap terhadap wujud atau tidaknya pertikaian; (ii) SP cacat disebabkan terdapat kesilapan; dan (iii) doktrin estopel tidak berbangkit di sini kerana mukaddimah di dalam SP diasas kepada satu kesilapan.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR:

(1) Selepas rujukan kepada timbangtara, pihak-pihak mengambil bahagian dalam prosiding timbangtara secara aktif di mana mereka, antara lain, terlibat dalam perlantikan penimbangtara dan menghadirkan diri dalam pertemuan awal dengan penimbangtara, sementara responden dan perayu masing-masing telah menyerahkan butiran tuntutan dan membuat permohonan interlokutori untuk mendapat butiran-butiran lanjut dan lebih jelas. Semua ini menunjukkan wujud rujukan kepada timbangtara secara *ad hoc*. Selain itu, pihak-pihak semestinya telah mengakui kesahan rujukan kepada timbangtara bilamana mereka menggunapakai s. 22 Akta untuk mengemukakan kelima-lima persoalan undang-undang ke Mahkamah Tinggi untuk keputusan. Selain itu, SP juga dikeluarkan secara bersama oleh pihak-pihak ekoran pertukaran lima surat-menyurat berkaitan perlantikan penimbangtara. Adalah jelas dari mukaddimah bahawa SP dibuat secara bersama dan kerana itu adalah satu perjanjian *ad hoc* atau baru. Ia adalah ekoran persetujuan berterusan untuk menimbangtara (fasal timbangtara 43 kontrak berkenaan) yang berkembang dan menjadi satu perjanjian persendirian untuk menimbangtara (SP).

(2) Fakta dan peristiwa-peristiwa yang berlaku tidak dinafikan. Yang dipertikaikan, jikapun ada, hanyalah inferens atau konklusi yang perlu dibuat dari fakta-fakta sedia ada dan pelaksanaannya dalam lingkungan fasal 43 timbangtara. Inferens dan konklusi sedemikian adalah perkara yang perlu ditafsir oleh mahkamah. Adalah menjadi undang-undang mantap bahawa pentafsiran suatu dokumen bertulis adalah merupakan persoalan undang-undang dan bukannya fakta. Oleh itu, kewujudan kesilapan, seperti yang didakwakan perayu, jikapun terpakai, paling tinggipun merupakan kesilapan undang-undang. Kesilapan undang-undang tidak memberikan kesan yang mencacatkan. SP dengan itu masih menjadi perjanjian *ad hoc* yang sah untuk melantik penimbangtara, sekaligus memberikannya bidangkuasa perlu untuk mendengar halperkara.

(3) Mengambilkira kelakuannya seperti yang ternyata pada 16 item di dalam penyata fakta-fakta dipersetujui di rekod rayuan, perayu tidak berhak untuk mempertikaikan kesahan prosiding timbangtara. Perayu melibatkan diri dalam prosiding timbangtara sejak ianya bermula. Pihak-pihak juga berhasrat supaya SP mengikat mereka dan tiada kekhilafan berkaitan perkara itu. Yang arif hakim dengan itu betul dalam membenarkan estopel dibangkitkan dan dalam menjawab bahawa penimbangtara telah dilantik secara sah dan berbidangkuasa untuk mendengar halperkara. Oleh itu yang arif hakim telah menjawab S3, S4 dan S5 dengan betul.

Case(s) referred to:

Bahamas International Trust Co Ltd & Anor v. Threadgold [1974] 1 WLR 1514 HL ***(refd)***

Jones Engineering Services Ltd v. Balfour Beatty Building Ltd & Anor [1992] 42 Con LR 1 ***(foll)***

NVJ Menon v. The Great Eastern Life Assurance Co Ltd [2004] 3 CLJ 96 CA ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 22(1)(a)

For the appellant - Rabindra S Nathan (Lee Chuan Eng with him); M/s Ee & Lim

For the respondent - Khoo Guan Huat (Suaran Singh with him); M/s Cheng & Assoc

[Appeal from High Court, Kuching; Originating Summons No: 24-277-2002-1]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim JCA:

Background

[1] The arbitrator, Tan Sri Datuk Amar Chong Siew Fai (the former Chief Judge of Sabah and Sarawak) at the request of the appellant and the respondent, referred by way of case stated pursuant to s. 22(1)(a) of the Arbitration Act 1952 (the Act) five questions of law for the determination of the High Court. The five questions posed and the answers given by the learned judge as reported in [2004] 5 MLJ 449 are as follows:

(1) Q: Whether or not a dispute or difference had arisen between the appellant and the respondent;

A: No.

(2) Q: If the answer to (1) above is in the affirmative was there a reference of the dispute or difference by the respondent to the engineer for a decision?;

A: As the answer to (1) above is 'No', this question does not arise for consideration.

(3) Q: If the answer in (2) above is in the negative can the arbitration be proceeded with and continued further?;

A: Notwithstanding that question (2) was not answered, the answer is 'Yes' in view of the answer to questions (4) and (5).

(4) Q: Alternatively whether the arbitrator has been validly appointed by the parties pursuant to the letter of appointment dated 12 December 2001;

A: Yes.

(5) Q: In the further alternative whether the appellant in view of their conduct as stated in the statement of agreed facts is now entitled to dispute the validity of the arbitration proceedings.

A: No.

[2] Dissatisfied with the decision, the appellant appealed to us. On 14 May 2005 we unanimously dismissed the appeal with costs and affirmed the decision of the learned judge and further ordered that the deposit be paid to the respondent to account of its taxed costs.

[3] The appeal before us was directed against the learned judge's answers to questions (3), (4) and (5) of the case stated. The appellant contended that the answers to the questions were erroneous on the grounds that:

(i) since the learned judge had made a finding that there was no dispute or difference between the parties, there was no valid reference to arbitration that could have been made as there was a mistaken belief with regard to the existence or otherwise of a dispute or difference between the parties,

(ii) the letter of appointment was vitiated on the ground that there was a mistake; and

(iii) the doctrine of estoppel did not arise in this case as the recital in the letter of appointment was premised on a mistake.

[4] It is worthy of note that the proceedings under s. 22 of the Act for the decision of the High Court judge were purely for the consideration of matters of law posed to him which arise in the course of the arbitration proceedings. Thus, the learned judge, when making his findings on questions (4) and (5), was entitled to treat and indeed treated them independently of questions (1) and (2). Questions (4) and (5) too were separately considered by the learned judge and they were drafted as stand-alone questions, which are to be answered in the alternative to the other questions.

[5] With regard to question (4) which reads:

> (4) Alternatively whether the arbitrator has been validly appointed by the parties pursuant to the Letter of Appointment dated 12 December 2001,

it is clear that what was sought to be impugned before the learned judge was the appointment of the arbitrator and not the letter of appointment dated 12 December 2001. Since the validity of the letter of appointment was not challenged, we therefore agree with the respondent that there was no necessity for the learned judge to make any finding thereon. As such, the learned judge was right in that he did not even need to consider the possibility of mistake based on circumstances leading to the letter of appointment that the appellant now alleges to have existed. Furthermore, the issue of a mistake was not even posed by the arbitrator for the decision of the High Court and therefore, the need to consider it does not arise.

Was There An Ad-hoc Agreement?

[6] It was the submission of the appellant that when the parties entered into the letter of appointment, they were acting on a mistake of fact because they were under the assumption that there were disputes and differences between them resulting in the operation of cl. 43 of the General Conditions of Contract which reads:

Arbitration

43(a) If any dispute or difference shall arise between the Authority (the appellant) and the Contractor (the respondent), either during the progress or after completion of the Works, or after the determination of the Contractor's (the respondent's) employment, or breach of this Contract, as to:

(i) the construction of this Contract, or

(ii) any matter or thing of whatsoever nature arising under this Contract, or

(iii) the withholding by the Engineer of any certificate to which the Contractor (the respondent) may claim to be entitled, then such dispute or difference shall be referred to the Engineer for a decision.

(b) The Engineer's decision which is to be in writing shall subject to sub-clause (e) hereof be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor (the respondent) who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.

(c) If the Engineer fails to give a decision for a period of forty five (45) days after being requested to do so by the Contractor (the respondent) or if the Contractor (the respondent) is dissatisfied with any decision of the Engineer, then in any such case the Contractor (the respondent) may within forty five (45) days after the expiration of forty five (45) days after he had made his request to the Engineer, or forty five (45) days after receiving the decision of the Engineer, as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between parties to act as the Arbitrator.

(d)-(j) ...

Since the High Court answered question (1) of the case stated that there was no dispute or difference between the parties, the appellant argued that there was no valid reference to arbitration could have been made by the respondent, and as such the letter of appointment did not amount to, and could not be construed as an 'ad hoc' agreement to arbitrate.

[7] With respect, we do not agree with the appellant. In *Jones Engineering Services Ltd. v. Balfour Beatty Building Ltd. & Anor* [1992] 42 Con LR 1, the plaintiffs Jones Engineering Services Ltd (Jones) were invited by the defendants, Balfour Beatty Building Ltd (Balfour Beatty), to tender for electrical and mechanical engineering work in connection with a project known as 13-14

Appold Street, London EC2, in respect of which Balfour Beatty was the main contractor. The tender was based on the provisions of DOM/1 and documents annexed thereto. There were certain exchanges to start off with as of the contractual basis of the work prior to and shortly after work commenced in February 1988. The work then continued and was completed but disputes arose as to the scope of the agreement and in particular whether two documents called 'programme sections' were included in it.

On 15 September 1989 Jones gave notice to Balfour Beatty of their intention to refer the disputes to arbitration and subsequently an arbitrator was appointed by the President of the Royal Institution of Chartered Surveyors, purportedly under the provisions of cl 3.1. of DOM/1, which reads as follows:

> In the event of any dispute or difference between the contractor and sub-contractor whether arising during the execution or after the completion or abandonment of the sub-contract works or after the determination of the employment of the sub-contractor under sub-contract DOM/1 whether by a breach or in any other manner in regard to any matter or thing of whatsoever nature arising out of the sub-contract or in connection therewith then either party shall give to the other such notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to arbitration.

The arbitrator held a preliminary meeting on 5 March 1990 which was attended by both parties. He issued directions for pleadings and other matters and pleadings relying on the provisions of DOM/1 were subsequently served by both parties. However, on the first day of the hearing, the plaintiffs' counsel raised an issue as to the validity of the sub-contract and, as the hearing proceeded the status of the 'programme sections' was raised. The arbitrator directed that the parties should make written submissions to him on this point and they subsequently did so.

The arbitrator, having considered those submissions, expressed a preliminary view on the issue, whereupon Balfour Beatty challenged the jurisdiction of the arbitrator on the ground that there was no concluded contract between the parties. Jones applied to the court for declarations (as opposed to our case – for case stated) as to the validity of the arbitrator's jurisdiction.

The principal issue before the court was that, even if there was no sub-contract between the parties, there was an ad hoc agreement to submit the disputes to arbitration in accordance with

cl. 3 of DOM/1 and that, in light of the parties' conduct during the hearing, estoppel by convention precluded Balfour Beatty from attacking the arbitrator's jurisdiction. In that case the High Court held:

> (1) There was an ad hoc reference to arbitration on the terms of cl. 3 of DOM/1 and that ad hoc reference was entered into at or immediately after the arbitrator's appointment when the parties appeared before him, got directions and fulfilled them. That was repeatedly reaffirmed, including in particular the exchange of pleadings, the continuation over 13 full or pan days of the hearing, and by the detailed responses to the arbitrator's directions for submission on the 'programme sections' issue. All this was evidenced by numerous documents and the evidence showed beyond doubt that this fell within the definition in s. 32 of the Arbitration Act 1950 and was therefore a valid ad hoc submission to arbitration.

[8] Likewise in the present case after reference to the arbitration, the parties engaged actively in the arbitration proceedings wherein both parties, *inter alia*, were involved in the nomination of and appointment of the arbitrator; they attended the preliminary meeting with the arbitrator; the respondent served the points of claim; and the appellant made an interlocutory application for further and better particulars. All these go to show that there was clearly an ad hoc reference to the arbitrator. Moreover, the parties must have acknowledged the validity of the reference to the arbitration when they invoked s. 22 of the Act to refer the five questions of law for the decision of the High Court.

[9] Further, the letter of appointment was jointly executed by the parties following an exchange of five letters on the appointment of the arbitrator. The letter of appointment is a joint document which states:

> THIS LETTER OF APPOINTMENT is **JOINTLY MADE** the 12th day of December, 2001, by PILECON ENGINEERING SDN. BHD. (Co. No. 29223-P), the Claimant (the respondent) herein, and BINTULU DEVELOPMENT AUTHORITY, the Respondent (the appellant) herein (emphasis added)

It then proceeds to "JOINTLY APPOINT TAN SRI DATUK AMAR CHONG SIEW FAI as the sole arbitrator for the purposes of cl. 43 of the General Conditions of Contract." It is therefore clear from the recital that the letter of appointment was jointly made and thus constitutes a fresh or an ad hoc agreement.

It is the result of a continuous agreement to arbitrate (the arbitration cl. 43 of the underlying contract) being crystallized into an individual agreement to arbitrate (the letter of appointment).

Was The Letter Of Appointment Vitiated By Mistake?

[10] The next issue is whether the letter of appointment was vitiated by mistake. According to the appellant the mistake is one of fact based on the point that it relates to misapprehension of the underlying facts and background events leading up to the invoking of cl. 43 and the appointment of the arbitrator. However, we do not agree with the appellant. The underlying facts and background events are not in dispute. The facts have been agreed. If at all, what was misapprehended was the inference or conclusion to be drawn from the settled facts to be applied within the arbitration cl. 43. Such an inference or a conclusion is a matter of construction by the court. It is trite law that the construction of a written document is a question of law and not fact. (See *Bahamas International Trust Co. Ltd. & Anor v. Threadgold* [1974] 1 WLR 1514 HL; *NVJ Menon v. The Great Eastern Life Assurance Co. Ltd.* [2004] 3 CLJ 96 CA). Hence, the existence of mistake as alleged by the appellant, even if applicable, is at most a mistake of law. A mistake of law will not have any vitiating effect. The letter of appointment remains a valid ad hoc agreement to appoint the arbitrator thus empowering him with the necessary jurisdiction to hear the matter.

Estoppel

[11] On the question of estoppel, the learned judge said at p. 466 para 40 of his judgment:

> Here, it was the respondent (appellant) who had initially nominated Tan Sri Datuk Amar Haji Jemuri Serjan as arbitrator but when he declined appointment agreed to the appointment of Tan Sri Datuk Amar Chong Siew Fai as arbitrator. Then the respondent (appellant) executed the letter of appointment in which it expressly acknowledged and confirmed the existence of disputes and differences between it and the claimant (respondent) and thereafter it appeared before the arbitrator, received directions and had also requested for further and better particulars of the claimant's (respondent's) points of claim and requested time to file its points of defence. All the actings of the respondent (appellant) which I have just referred to were positive and affirmative in nature and when viewed as a whole show that throughout the whole period before and during the arbitration the respondent

A (appellant) (as well as the claimant (respondent)) had proceeded on the assumption that there were disputes and differences which had arisen between the claimant (respondent) and respondent (appellant) which had been referred to the engineer for a decision which now required to be arbitrated. It would be unconscionable and unjust to now allow the respondent (appellant) to resile from that position and assert lack of jurisdiction on the part of the arbitrator.

We agree with the findings of the learned judge. In *Jones Engineering, supra,* the court there also held:

C (2) From the inception of the arbitration, and all the way through, there was an agreed assumption that there was a valid arbitration agreement in being in terms of cl. 3 of DOM/1. That agreed assumption was acted upon throughout the arbitration proceedings. It would be most unconscionable to allow Balfour Beatty to depart D from that agreed assumption, seeing that Jones had incurred very substantial costs, both in their preparation for the hearing and in their pleadings and in interlocutory matters and in 13 full or part days of hearing, including legal representation, calling of witnesses, etc in reliance on that assumption. An estoppel by convention E arose which prevented Balfour Beatty from going back on the agreed assumption that a valid arbitration agreement on the terms of cl. 3 existed.

[12] In our case, it is clear that the appellant, in view of its conduct as stated in the 16 items in the statement of agreed facts F at pp. 346 to 349 of the appeal record, is not now entitled to dispute the validity of the arbitration proceedings. The appellant had participated in the arbitration proceedings from the inception. The parties had intended the letter of appointment to be binding on them and there was no mistake with regard to that. The G learned judge was therefore correct in permitting the estoppel to be raised and answering the questions that the arbitrator was validly appointed and had jurisdiction to hear the matter. In our view, the learned judge answered questions 3, 4 and 5 correctly.

H **[13]** My learned brother Arifin bin Zakaria, FCJ has seen this judgment in draft and has expressed his agreement with it. However, my learned brother Abdul Kadir bin Sulaiman, FCJ has since retired and has no opportunity to see the judgment in draft.

I